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In the Supreme Court of the United States

October Term, 1915.

St. Louis & San Francisco Railway Company,
Plaintiff in Error,
vs.
Harry A. Brown,
Defendant in Error.

No. 399

In Error to the Supreme Court of the State of Oklahoma

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

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ARGUMENT

I.

The court did not err in instructing the jury that nine jurors could return a verdict.

The constitutional question having been argued in a general brief herein filed, we pass that ques-

tion with the statement that in the trial court, in the instant case, no contention was made that the court did not have jurisdiction of the cause. The only way in which the question was presented 6 - the trial court was by a general exception to paragraph 19 of the court's charge which told the jury that as many as nine jurors could reach a verdict.

II.

The court did not err in refusing to direct a verdict for defendant upon the ground that plaintiff had assumed the risk.

The first, fourth, fifth and sixth assignments of error are, by the plaintiff in error, grouped under one argument, and, in the aggregate, present the claim that when the plaintiff below abandoned that count of his cause of action which was based upon the Safety Appliance Act, he necessarily withdrew from the consideration of the jury all testimony which had been introduced tending to show the defective condition of the car couplings. Based upon this assumption, the contention is that the State court held that the law of the assumption of risk was not available as a defense to the action. The plaintiff alleged two distinct grounds as a basis of recovery. It was charged: First. That, while engaged in interstate commerce, the

plaintiff stepped in between the rails of defendant's railway for the purpose of adjusting the knuckle on the coupler, after first having given the engineer a signal, not only to stop, but to hold the engine, until the coupler could be adjusted; and that while engaged in the discharge of such duty, the engineer, without warning, started the cars in motion, which knocked him to the ground and injured him; and, Second. That the couplings of the cars were defective in that they were not such as required by the act of Congress. After the introduction of the testimony the plaintiff abandoned his right to recover under the Safety Appliance Act, and went to the jury upon the count which was based upon the Employers' Liability Act.

The evidence which was introduced tending to show the defective condition of the couplers was not by the court withdrawn from the jury and no request was made by the defendant to have the same withdrawn. The somewhat surprising claim, however, is now made that, *as a matter of law*, the evidence which had been introduced going to show the defective condition of the couplers was automatically withdrawn, and that this being so the plaintiff had assumed the risk, and the

court should have charged the jury to return a verdict for the defendant. The contention is so patently unsound as to be difficult of argument. If the suit had been primarily based solely upon the Employers' Liability Act, and no reference had been made to the Safety Appliance Act, confessedly, the testimony as to the defective couplings would have been admissible for the purpose of justifying the plaintiff in going between the rails of the track for the purpose of adjusting the coupling.

The contention of the defendant that the plaintiff should have remained entirely off the track and managed the couplings by using the lever, and that in failing so to act he was guilty of contributory negligence, would have been met by evidence that the lever would not lift the coupling, and that it became necessary to go between the rails for the purpose of making the adjustment. This testimony as to the defective coupling was competent, whether the defendant proceeded upon the Employers' Liability Act or upon the Safety Appliance Act. It is impossible to understand how the testimony became incompetent to support the first count of the complaint because the plaintiff abandoned the second count and proceeded

just as though the cause of action had been based originally upon the Employers' Liability Act alone.

If the plaintiff in error's assumption with reference to this question is unsound, then necessarily its further contention that the State court committed error with reference to the doctrine of assumption of risk falls to the ground. It is contended that the State court held the defendant below could not interpose the defense of assumption of risk. This assignment is based upon a misconception of the record. In the eighteenth paragraph of the court's charge the doctrine of assumption of risk was expressly submitted to the jury (Tr. 153). This latter contention of the plaintiff in error is based upon a statement by Justice Riddle of the State Supreme Court, that the trial court would have been justified in refusing to submit the question of assumption of risk to the jury. The opinion of the State Supreme Court discloses the fact that in that court the plaintiff in error was making a contention which is abandoned in this Court, that is: It was there claimed that the last clause of the eighteenth paragraph of the court's charge, wherein the jury was told that the plaintiff did not assume the risk that resulted from negligence of a fellow servant,

was error. It was in answer to this contention that the learned justice in the State court used the language which it is now contended ought to reverse this case. This contention entirely overlooks the fact that the trial court distinctly submitted to the jury the doctrine of assumption of risk. The most that can possibly be said of the language of the State Supreme Court, which is so criticised, is that it was dictum.

In these four assignments of error which we are now considering it is claimed in a general way that the testimony conclusively shows that the defendant was not guilty of negligence, but that the plaintiff was guilty of such contributory negligence (which is erroneously discussed as assumed risk), as to make it the duty of the trial court to instruct a verdict for the defendant. It is confessed here (though denied in the State court) that at the time of the injury, plaintiff below was assisting the defendant in interstate commerce. It not being necessary, therefore, for this Court to examine the evidence to determine whether or not the cause of action was supported by the Employers' Liability Act, it is not believed that this Court will review the testimony for the purpose of determining whether or not the defendant was guilty of

negligence or whether the plaintiff was guilty of contributory negligence. These questions of fact were submitted to the jury upon conflicting testimony, and being questions of general law, and not essentially Federal in character, are not before this Court for determination.

But will this Court review the action of the State Supreme Court wherein it held that the plaintiff below, in dismissing that portion of his complaint which was based upon the Safety Appliance Act, did not withdraw from the jury all the testimony he had introduced with reference to the defective coupling? Is any Federal question here involved? Certainly it did not involve the construction of any act of Congress. It was rather a question of general law depending for its solution upon local construction. It was merely incidental to the Federal questions involved in the case and did not, in its essence, involve the existence either of plaintiff's right to recover under the Federal statute or of the defendant's right to be ~~shielded~~ shielded under that statute.

Sea Board Air Line Ry. Co. v. *Padgett*, 236 U. S. 668.
Central Vermont Ry. Co. v. *White*, 238 U. S. 507.
Sea Board Air Line Ry. Co. v. *Duvall*, 225 U. S. 477.

But, however this may be, the testimony was of such a nature that it was impossible for the trial court to withdraw the case from the jury. The plaintiff below testified that after detaching certain cars from a string of cars attached to the engine, he moved over to another track upon which certain cars were standing, and undertook to adjust the coupling at the end of the car nearest to the cars attached to the engine, which were to be backed up and coupled on to the standing cars. He says that he found that the lever would not lift this coupling, and that he then adjusted it with his hand (Tr. 44). He then followed up a short distance in the direction of the engine and the cars attached thereto, turned the switch so that the way would be clear to go back and couple on to the stationary cars. He then gave the engineer a signal to stop the moving cars. This signal was observed and the cars brought to a standstill. He then gave the engineer what he called the "spot signal." That signal meant that the engineer was not to start the cars until he received a signal so to do. When he saw that the engineer had observed his "spot signal," he went on south to go across the track for the purpose of lifting the pin on the end of the car which

was to be pushed back and coupled and fastened to the coupling of the other car which he had adjusted. Having seen that the engineer had observed his "spot signal," he approached the car where he was to use the lifting pin or lever and took hold of it for the purpose of working the knuckles. He saw that it woudn't lift the knuckle, and then, while holding this lever or lifting pin with his left hand, he took hold of the knuckle with the right hand to open it so that by impact it would couple on to the stationary car which had been first adjusted while in this position. He heard the slacking of the cars attached to the engine, and realizing that the cars had been put in motion he tried to escape from the track (Tr. 45-46). It will be seen that the plaintiff testifies that before he went on the track he saw that the engineer had received his "spot signal" (Tr. 46). He testified also that he was attempting to adjust the knuckle in the usual and customary way (Tr. 71). The only testimony contradicting the plaintiff is that of the engineer, Chamberlain, who agrees with the plaintiff that upon signal he stopped the train. He says he then received the "back up" signal and started the cars back, which resulted in the injury (Tr. 89-90). The only two

witnesses, therefore, upon this question were the plaintiff and Chamberlain, both agreeing that the "stop signal" was given and obeyed, the plaintiff contending that the "spot signal" was given and disobeyed, Chamberlain contending that instead of the "spot" signal, the "back up" signal was given. It is possible that the engineer mistook the "spot" signal for the "back up" signal.

In any event, this conflict was resolved by the jury in favor of the plaintiff. It being established, therefore, that when the plaintiff stepped in front of the car, which was standing still, he believed that the engineer had received his "spot" signal, he had a right to assume that the car would not be put in motion; and this Court cannot say, therefore, as a matter of law, that he was guilty of contributory negligence in attempting to adjust the knuckle, which would not work by using the lever, and which could not be reached without the plaintiff stepping between the rails. Much stronger cases of contributory negligence have been by this Court left where the jury left them. In the case of *Minneapolis, St. Paul, Etc., Ry. Co.* v. *Popplar*, 237 U. S. 369, the servant stepped between two cars which were moving at the rate of four miles per hour, in order to undo the

coupling by hand, when he was run over and killed. See also *Grand Trunk Ry. Co.* v. *Lindsay*, 233 U. S. 42. Apparently the evidence tending to show negligence upon the part of the plaintiff there was much stronger than the testimony in the instant case, but the judgments were affirmed. In the case of *Sea Board Air Line Ry. Co.* v. *Beauregard, Magdalene Konnecke, Etc.*, decided on December 13, 1915, this Court indicated that upon all questions of fact not essentially Federal in character it would not disturb the finding of the jury. In the case of *Kanawah & M. R. Co.* v. *Kerse*, decided on January 10, 1916, this Court says:

> "The burden of proof of assumption of rick was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses and free from contradiction, the trial court could not be charged with error in refusing to take the case from the jury."

Moreover, we believe that the doctrine of assumption of risk has no place in the case, and that what plaintiff in error is really contending for is: That the defendant in error was guilty of such contributory negligence as to defeat his right to recover. It is not always easy, of course, to distinguish between contributory negligence and

assumed risk, but it seems that there ought to be no difficulty in this case. In Section 4611, Volume 4, of Thompson on Negligence, it is said:

> "Many of the earlier and some of the later decisions confuse the two subjects of an acceptance by the servant of the risk of employment, and his contributory negligence. The two subjects lie close to each other and in some cases blend; but in other cases they are distinct subjects. Nevertheless, the judges frequently use the words, 'an acceptance of the risk,' where they really mean contributory negligence. Let us illustrate this by the every day accident connected with coupling cars. In order to make a coupling the cars must be thrust together either by a locomotive or by a propulsion called 'kicking' or 'shunting,' or by gravity. There is consequently always danger to the brakeman in the operation. If, in making the coupling, he accidentally, and without negligence, slips and falls and passes under the wheel, his injury is ascribed to one of the ordinary risks of employment, which risk he has accepted, and no damages can be recovered for it. But if, instead of using the coupling stick furnished him by the railway company, he undertakes to make the coupling with his hands and in the operation gets his hand crushed, this is contributory negligence, and consequently no damages can be recovered. The distinction between the two cases is that in the former case the brakeman was not guilty of negligence at all; consequently the expression, 'contributory negligence,' could not be properly applied to his act, but what he suffered was from a mere accident attending the known

danger, the risk of which he assumed; whereas in the latter case his own negligence and rashness brought upon him the injury which he suffered."

In Section 4611, Volume 8, the same author says:

"The doctrines of assumed risk and contributory negligence are separate and distinct. The defense of contributory negligence rests on some fault or omission of duty by the plaintiff and may be urged, notwithstanding the negligence of the defendant, while the defense of assumed risk rests on contract, express or implied."

See also:

Sea Board Air Line Co. v. *Horton*, 233 U. S. 492.
Pierce v. *Clavin*, 82 Fed. 550.

III.

The court did not err in instructing the jury as to the effect of contributory negligence, nor in failing to give defendant's requested charge on contributory negligence.

Assignments seven and eleven, argued together in the brief of plaintiff in error, relate to the alleged error of the Supreme Court of Oklahoma in approving Instruction No. 13 given by the trial court, and approving the action of the trial court in refusing to give Instruction No. 12,

requested by the defendant. The instruction given by the trial court was as follows:

"If you should find under the instructions heretofore given you that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, *but that you should reduce his damages in proportion to the amount of negligence which was attributable to him.*"

The instruction requested by defendant and refused by the trial court was as follows:

"If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in Instruction No. 8, then you are instructed that you will be governed by Section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L., p. 66, which is as follows:

> "'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employe.'
>
> "*The statute requires the jury to diminish*

the amount of the recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the court to instruct the jury on the meaning of the language 'in proportion' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in a statute we are required to look to the intent and purpose of the statute and the context in which we find the word. *I instruct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words, 'in proportion,' as used in the statute, to mean such part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.*

"You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them to be in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But if you find that the defendant was guilty of negligence and that such negligence was the

proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence, then you must determined the whole amount of such damages sustained by the plaintiff and, having done so, you must diminish such damages by deducting therefrom such proportion or just such share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict."

Plaintiff in error contends that the instruction given was erroneous, in that it told the jury to apply the doctrine of "comparative negligence," a rule which this Court held, in the case of *Norfolk & Western R. Co.* v. *Earnest*, 229 U. S. 114, 57 L. Ed. 1096, to be a wrong application of the rule prescribed by the Federal Employers' Liability Act of 1908, respecting the diminution of damages on account of contributory negligence on the part of the plaintiff. We deem the opinion in the Earnest case a sufficient answer to this contention. In that case the instruction given by the court was as follows:

> "Contributory negligence is the negligent act of the plaintiff which, concurring and cooperating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, *but the damages*

shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

"So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, *but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant.* If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence."

It will be observed that the first portion of this instruction is in almost the exact language of the instruction given by the trial court in the instant case. However, the trial court in the Earnest case did not stop with giving this portion of the instruction, but went further, and, in plain terms, stated that the negligence of the plaintiff should be compared with the negligence of the defendant in determining the amount of damages to be given. In commenting upon this language, Mr. Justice Van de Venter said:

"The other criticism deserves more discussion. *The thought which the instruction expressed and made plain was that if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in the proportion to the amount of*

his negligence. .This was twice stated, each time in terms readily understood. But for the use in the second instance of the additional words 'as compared with the negligence of the defendant,' there would be no room for criticism."

It is apparent that the Court expressly approved the first portion of the instruction in that case, which is exactly like the instruction given in the instant case. The Court expressly states that had the trial court stopped the instruction at the point reached by the trial court in the instant case, there would have been no room for criticism. It was only because the trial court in the Earnest case, after correctly stating the law to be applied, went further and, by an "unhappy use of words," instructed the jury to *compare* the negligence of the plaintiff with that of the defendant, that the Court held it had misstated the law. It will be observed, however, that this error in the latter part of that instruction was not sufficient to authorize a reversal of the case. It would seem that this opinion is a sufficient answer to the contention of the plaintiff in error. However, a further brief reference may be permissible.

Two cases only are relied upon in the brief.

One of them, *Seaboard Air Line Ry. Co.* v. *Tilghman*, 237 U. S. 498, 59 L. Ed. 1069, and the other, *Nashville Ry. Co.* v. *Banks*, 161 S. W. 554.

It is urged that the trial court should have given the requested Instruction No. 12 upon the authority of these two cases. It will be observed that the first portion of the instruction requested by defendant is in the exact words of the instruction actually given by the court. *The remainder of the requested instruction, however, is based upon the assumption that the rule of proportion to be observed by jurors when undertaking to diminish the damages on account of contributory negligence of the plaintiff is not a mathematical rule, but that by the terms of the statute it is left to the jury to determine what they deem is a "fair and just proportion" of the damages to be deducted on account of the plaintiff's negligence.* This portion of the requested instruction was so erroneous that had the trial court given it over the objection of either party it would have warranted a reversal of the case. In the Tilghman case Mr. Justice Van Devanter, who wrote the opinion in the Earnest case, expressly disapproved an instruction that "if the jury found the plaintiff was guilty of contributory negligence, it should

then determine the full amount of damages and deduct from that whatever amount it deemed proper for his contributory negligence." It was specifically held that such an instruction committed to the jury the matter of diminishing the damages without any other standard than their own conception of what was reasonable.

So, when the plaintiff in error requested the trial court to instruct the jury that the word "proportion," used in the statute, was not used to describe a mathematical proportion, but that the jury should construe the word to mean "such part of the total damage as the jury might find to be *justly and fairly attributable* to the negligence of the plaintiff," it was requesting an instruction which in principle was exactly like the instruction disapproved in the Tilghman case. It seems that the words "in proportion" as used in this statute *are* used in their mathematical sense, and that it was not intended that the jury should be left to determine what they think was a "fair and just" proportion to be deducted on account of the negligence of the plaintiff.

In *Chadwick* v. *Oregon & Washington R. Co.*, 144 Pac. 1165; *Tilghman* v. *Seaboard Air Line*

Ry. Co., 83 S. E. 315, and *Cross* v. *Chicago, B. & Q. R. Co.*, 177 S. W. 1127, State courts have taken this view of the act. The illustration used in each of these cases is, that if the jury should find that both parties were equally negligent, and should further find that the actual damages of the plaintiff were properly assessable at $2,000, then the verdict should be for $1,000, for the reason that the plaintiff's negligence is one-half of the total negligence of both parties. Clearly this is the intent of the statute. Yet, if plaintiff in error's contention be correct, then, though the jury found, in the supposed instance, that the negligenceof each party contributed equally to the damage, the jury, in diminishing the damages in the amount which it deemed "fair and just," would be authorized to fix the damage caused by plaintiff's negligence at $500 and thus give him judgment for $1,500 against the company, or, upon the other hand, it might assess the damages caused by plaintiff's negligence at $1,500 and only give him judgment for $500. In either event the damages would not be assessed in proportion to the amount of negligence attributable to the plaintiff, and the method pursued would fall squarely within the rule condemned in the Tilghman case.

To sustain the contention of plaintiff in error, that it was entitled to have Instruction No. 12 submitted to the jury, would result, necessarily, in leaving with the jury the option to do the very thing which the statute, as construed in the Tilghman and Earnest cases, says it cannot do, that is, apply the doctrine of "comparative negligence." We use the words "comparative negligence" here in the sense that the jury might *compare* the negligence of plaintiff with that of defendant. *We say this because it is apparent that if the jury, after having determined that plaintiff's negligence contributed three-fourths to the entire damages sustained by him, may then determine what is the "just and reasonable proportion" of the damages he has received on account of his own negligence, from their own ideas of what is just and reasonable, then the jury may determine that, according to their idea of what is just and reasonable, all the damage he has received has beencaused by his own negligence, thus in effect applying the doctrine of "comparative negligence" and refusing him any relief, even though the same jury should find that the defendant's negligence contributed one-fourth to his injury.* If the jury, after having determined the ~~proposition~~ proportion of negli-

gence attributable to each party, may then diminish the damages, not according to the mathematical proportion, but according to what the jurors deem "fair and reasonable," then, though they find that the negligence attributable to the plaintiff was only three-fourths of the total negligence attributable to both parties, they may according to their idea of fairness and justness diminish his damages seven-eighths. The unsoundness of such a theory is clearly apparent. Yet this is the theory contained in the instruction requested.

The Banks case is relied upon as sustaining the contention that the instruction as given was erroneous. That case was decided by the Court of Appeals of Kentucky. It will be observed that in the closing part of that opinion the court intimates that the holding as to the validity of the instruction was not entirely due to the form in which the particular instruction itself was given. The court there stated: "The instruction of the court does not conform to the rule thus laid down. It does not in terms state what the amount of negligence attributable to him is to be in proportion to; but, *as in the previous part of the instruction, the negligence of the defendant and his negligence are referred to, we think, the natural*

meaning of the instruction is that the damages are to be diminished in proportion to the amount of negligence attributable to him, and that attributable to the defendant, which, as shown above, is not the construction of the statute adopted by the Supreme Court." It is evident that the court in thus disapproving the form of instruction actually given in the instant case, based its holding largely upon the fact that, taken in connection with other instructions, it believed the court had instructed the jury to apply the rule of "comparative negligence." The Kentucky court thought that its holding was in accordance with the opinion of this Court in the Earnest case. It is clear that the court misconstrued that opinion, and this fact is practically admitted by the same court in the later case of *Cincinnati, N. O. & T. P. R. Co.* v. *Goode*, 173 S. W. 329, where the court, referring to the Banks opinion, says:

> "In *N. C. & St. L. R. R. Co.* v. *Banks*, 156 Ky. 609, 161 S. W. 554; *N. C. & St. L. R. R.* v. *Henry*, 158 Ky. 88, 164 S. W. 310, and *L. & N. R. Co.* v. *Heinig's Admx.*, 162 Ky. 14, 171 S. W. 853, we had under consideration the proper instruction in this class of cases, and in each of these cases we held that an instruction similar to the one given in this case did not conform to the rule announced by the Supreme Court in the Earnest case. *We had*

doubt then, and it may well be doubted now, if the construction we placed on that opinion was correct; but we think it safer practice to now follow the views expressed in these opinions, and accordingly the judgment must be reversed for error in the instruction on the measure of damages.''

The annotators of L. R. A., New Series, 1915, C., in a note to the Seaboard Air Line Railway Company case, on pages 67 and 68 state: "The position of the Kentucky court is not entirely clear. Its statement as quoted is not very explicit, and it is difficult to read into the instruction the meaning which the Court of Appeals did."

It thus appears that of the two opinions so confidently relied upon by the plaintiff in error, the Banks case evidently misread of misconstrued the opinion in the Earnest case respecting the correctness of the instruction actually given by the Court; while in the Tilghman case the form of instruction requested by the defendant was expressly disapproved.

It is claimed that this statute with respect to the diminishing of the damages undertook to put in force the admiralty rule long applied by the United States courts in actions for negligence against ship owners. We have been unable to

find the purported statement of the Committee of the Judiciary set forth on pages 65 and 66 of the brief, but we are satisfied that the bill was not intended to put in force the admiralty rule with respect to the way in which the proportion of damages should be estimated by the jury. It is the general rule in admiralty cases that where there is contributory negligence the court will apportion the damages, "*provided the libellant's fault, although evident,* is neither willful, gross nor inexcusable, and the other circumstances present a strong case for relief." 36 Cyc. 165. *Max Morris* v. *Curry,* 137 U. S. 1, 34 L. Ed. 586; *The Serapis,* 49 Fed. 393. It is evident that in such cases the court apportions the damages, not according to the "proportion of the negligence," but according to its own ideas of justice and equity. This rule in admiralty cases is entirely different from that prescribed by the Employers' Liability Act, both in the manner as to the method of apportioning the damages and in that, under the admiralty rule, the damages will not be apportioned "unless the libellant's fault, though evident, is neither willful, gross nor inexcusable;" while under the Federal Employers' Liability Act the defendant is liable if it is guilty of any causative negli-

gence, however slight, in connection with that of the plaintiff.

New York, C. & St. Ry. Co. v. *Niebel*, 214 Fed. 952.

Plaintiff in error attempts to force the conclusion that the instruction given by the trial court applied the doctrine of comparative negligence. It is clear that the instruction, in the precise language of the statute, was correct, and that the instruction requested by the defendant, being the only instruction requested by it on this point, would have applied a rule unauthorized by the statute and in direct conflict with the opinion of this Court in the Tilghman case. The only case cited by plaintiff in error at all in point is the Banks case, and we have shown that that opinion was based upon a misconception of the holding of the Earnest case, a fact which was recognized by the Kentucky court.

As bearing upon the question that the instruction given by the trial court was correct, we refer also to the cases of:

Paree v. *Vandalia Ry. Co.*, 169 Ill. App. 12.

Grand Trunk W. R. Co. v. *Lindsay*, 233 U. S. 42, 58 L. Ed. 838.

The contention that the jurors may impeach their verdict is not an open question.

McDonald v. *Pless*, 238 U. S. 264.

No merit appearing in any of the assignments we respectfully suggest that the case should be affirmed.

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